United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2131

IN THE

United States District Court

FOR THE SECOND CIRCUIT

MILDRED IVES, MOIRA ROBERTSON & JOYCE CHAPMAN,
on behalf of themselves and others similarly situated,
Plaintiffs-Appellees,

vs.

W. T. GRANT COMPANY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REPLY BRIEF OF DEFENDANT-APPELLANT

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I.

The Federal District Court Has No Jurisdiction Over Claims Arising Under Truth-in-Lending Laws in The State of Connecticut.

It is defendant's position that 15 U.S.C. §1633 does not empower the FRB to limit an exemption from the requirements of federal law by providing that it shall not extend to the civil liability provisions of 15 U.S.C. §1640 and by further providing that state law shall be incorporated by reference into federal law. Defendant has argued in its brief that Congress' intention that state law shall pre-empt federal law is decisively established not only by the language employed in 15 U.S.C. §1633 but also by the legislative history. In their brief, plaintiffs make three argu-

ments: (1) Congress has recently "ratified the Board's interpretation of . . . 15 U.S.C. §1633", App'ees' Br. pp. 6-8; (2) the acceptance by the conferees of the House's administrative enforcement provisions gave the Board the "discretion" to grant a qualified exemption in order to ensure that the Act is "effectively administered", App'ees' Br. pp. 8-10; and (3) if the limitation is invalid the entire exemption falls *and* federal law retroactively applies and provides the basis for federal jurisdiction, App'ees' Br. pp. 10-11. Defendant shall deal with plaintiffs' arguments *seriatim*.

Public Law 93-495, effective upon signature of the President on October 28, 1974, contained what the Conference Report, H. Rep. No. 93-1429, referred to as "a series of basically technical amendments" to the Truth-in-Lending Act. 120 Cong. Rec. H9944 (daily ed. October 4, 1974). The House bill had contained no such amendments and the conferees had accepted the final Senate version. *Id.* In a debate on S.2101, one of the Senate bills, both Chairman Sparkman of the Committee on Banking, Housing and Urban Affairs, and Senator Proxmire, a member of the committee and the driving force behind the original Truth-in-Lending Act, also referred to the Truth-in-Lending amendments as basically technical. 119 Cong. Rec. S.14403, S.14406 (daily ed. July 23, 1973). The legislative history of the amendments not only confirms that they were technical only (the major provision limits the amount of recovery in class actions and was the subject of almost all of the debate), but also, to the best of defendant's knowledge, contains no reference to the jurisdictional question here at issue.

Thus, there is no indication that Congress, at any time during the consideration of the recent amendments, had received notice of or gave any thought whatsoever to the jurisdiction-creating adventure of the Board. As pointed out by Professor Davis in his treatise on administrative

law, "[w]henever a congressional awareness of the administrative interpretation does not appear and seems unlikely, the basis for the reenactment [ratification] rule vanishes." K. C. DAVIS, ADMINISTRATIVE LAW TREATISE §5.07 (1958), cited with approval in *Leary* v. *United States*, 395 U.S. 6, 25 n.40 (1969).

Furthermore, we are not dealing with an unchallenged administrative construction of long standing which is the paradigm fact situation giving rise to the ratification arguments. *See, e.g., Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). The Connecticut exemption was granted relatively recently, and to date only five states, including Connecticut, have received exemptions.

Moreover, the ratification rule is inapposite when an agency is attempting to "bootstrap itself into an area in which it has no jurisdiction. . . ." *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. at 745.

And, when a regulation exceeds the agency's power as set forth by Congress, reenactment without more cannot give it legitimacy:

> re-enactment cannot save a regulation which "contradict[s] the requirements" of the statute itself. When a regulation conflicts with the statute the fact of subsequent re-enactment "is immaterial, for Congress could not add to or expand [the] statute by impliedly approving the regulation." *Commissioner* v. *Acker*, 361 U.S. 87, 93 (1959). *Leary* v. *United States*, 395 U.S. 6, 25 (1969) (brackets supplied by the Court.)

Thus, the argument that Congress "ratified" the Board's attempt to confer federal jurisdiction over state law violations is wholly unsupported and without substance.

Plaintiffs' second argument, that the acceptance by the conferees of the House's administrative enforcement provisions gave the Board the "discretion" to grant a qualified

exemption in order to ensure that the Act is "effectively administered", is not relevant to the jurisdictional issue. Section 1633 does not distinguish between "administrative" and "judicial" enforcement. As pointed out in defendant's prior brief, App't's Br. p. 6, the only situation in which Congress ever intended an exemption to be "partial" is where state law limits itself to certain classes of transactions covered by federal law; in such case an exemption would apply only to that class of transactions covered by the state law and would thereby be a "partial" exemption only in the sense that the other requirements of federal law, not addressed by the state legislation, would continue in force. In an exhaustive review of the legislative history defendant failed to find a scintilla of evidence of a broader or contrary intention: plaintiffs' brief confirms defendant's conclusion that no such evidence exists. Indeed, after acceptance of the final bill, Senator Sparkman emphasized on the Senate floor that "[s]hould the States enact legislation substantially similar to the Federal bill, they can become exempt from the Federal law." 114 Cong. Rec. 11492 (May 22, 1968).

Plaintiffs' final argument is that if the limitations contained in the Regulation, 12 C.F.R. §226.12(c), are invalid, the entire exemption must fall *and* federal law would retroactively apply and provide a basis for federal jurisdiction. A basic canon of statutory construction is that if an invalid portion of a statute, regulation, or other application is severable from the remainder, the court, where possible, should only strike down the offending portion in order to effectuate the legislative purpose. *See, e.g., Fowler* v. *Gage*, 301 F.2d 775, 778-79 (10th Cir. 1962) ("Furthermore, we think the regulation is well within the spirit and general purpose of the law. Neither is its validity, even if subsection (i) should be declared void, affected thereby. The law is well settled that when a part of a statute is declared void, the entire statute falls unless the invalid portion can

be separated from the remaining part of the statute. That applies with equal force to a regulation which has the force of law . . ."). This rule applies whether or not Congress has included the familiar "severability" clause in the enabling legislation. *United States* v. *Jackson,* 390 U.S. 570, 585 n.27 (1968). In the Truth-in-Lending Act, however, Congress expressed its desire for severability in the event that a section of the act, or an application by an administering agency, were invalidated. Section 501 of the Act, Pub.L. 90-321, provides in pertinent part that "[i]f a provision enacted by this Act is held invalid in one or more of its applications, the provision remains in effect in all valid applications that are severable from the invalid application or applications." Here, the offending *limitation* is mere surplusage, since the Congressional intent was to foster exemption whenever the Board determines, as it did here, that the state law is "substantially similar" to federal law and adequate provision for enforcement exists.

II.

The Record Below Raises Material Issues of Fact With Respect to Plaintiffs' Truth-in-Lending Claims.

Defendant's prior brief sets forth in detail its arguments and authorities regarding the violations of the Truth-in-Lending Act, C.G.S. §§ 36-393 *et. seq.,* alleged by plaintiffs and found by the District Court. Defendant contends that a question of fact exists as to all of those violations, except the alleged failure to "describe each amount included in the finance charge," App't's Br. pp. 18-30, 33-38, and that the case should be remanded for a full evidentiary hearing on those issues. As to that latter violation, defendant contends that it is entitled as a matter of law to judgment in its favor. App't's Br. pp. 30-32. Defendant relies upon its

prior brief and will not reiterate at length the arguments there made. However, certain legal and factual positions taken by plaintiffs in their brief require comment.

A. The record before the District Court raises a material question of fact regarding the defenses available to defendant.

1. The 1974 amendments to the Federal Truth-in-Lending Act create questions of fact which were not considered by the District Court.

On October 28, 1974, the President signed P.L. 93-495, 1974 U.S. Code Congressional and Administrative News, pp. 5684 *et. seq.*, amending, *inter alia,* Section 130 of the Federal Truth-in-Lending Act, 15 U.S.C. §1640. That amendment, which became effective upon the date of its enactment, October 28, 1974, P.L. 93-495 §416, 1974 U.S. Code Congressional and Administrative News, p. 5709, gives creditors a new defense to civil liability for Truth-in-Lending violations, wholly distinct from the "unintentional violation" defense contained in §130(c):

> Section 130 of the Truth in Lending Act (15 U.S.C. §1640) [footnote omitted] is amended by adding at the end thereof a new subsection as follows:
>
> "(f) No provision of this section or section 112 imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason." P.L. 93-495 §406, 1974 U.S. Code Congressional and Administrative News, p. 5705.

Section 408(e) of the 1974 Act applies this new "good faith compliance" defense to all pending actions, even where liability has already been determined by the District Court.[1]

The Connecticut Truth-in-Lending Act, C.G.S. §36-407, has not been amended to include this language. However, under the partial exemption scheme employed by the FRB in validating the Connecticut Act, the new defense is available in actions brought in federal court to enforce claims under the state law, since that exemption specifically states that Sections 130 and 131 of the Federal Act remain applicable to actions brought under the Connecticut Act, 12 C.F.R. §226.12(c)(1),[2] and the new defense was enacted as an addition to §130.

Defendant claims that the alleged "failure to employ the term 'Unpaid Balance'" (Order ¶6(a), App. p. 182a) and the alleged "failure to describe each amount included in the finance charge" (Order ¶6(c), App. p. 183a) on its disclosure statement resulted from its reliance upon the sample disclosure statement provided by the FRB in its Handbook, "What You Ought to Know About Truth-in-Lending". App't's Br. pp. 19-20, 25, 31.[3] The application of the

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1. "The amendments made by sections 406, 407, and 408 shall apply in determining the liability of any person under chapter 2 or 4 of the Truth in Lending Act, unless prior to the date of enactment of this Act such liability has been determined by final judgment of a court of competent jurisdiction and no further review of such judgment may be had by appeal or otherwise." P.L. 93-495 §408(e), 1974 U.S. Code Congressional and Administrative News pp. 5706-07.

2. The new defense may only be available if, contrary to defendant's argument, the partial exemption is valid. However, if the Court agrees with defendant, see pp. 1-5, *supra*, and invalidates the partial exemption, the availability of the defense becomes moot for the present, as this case must be remanded to the District Court to determine the availability of alternative grounds of federal jurisdiction.

3. In addition to invoking the "good faith compliance" and "unintentional violation" defenses, defendant claims that the description of the finance charge is adequate as a matter of law. App't's Br. pp. 30-33; pp. 17-19, *infra*.

"good faith compliance" defense to this claim raises new questions of fact which must be resolved by the District Court before liability can be imposed.

Although the legislative history is not completely clear on the matter, a proper construction of the word "interpretation" in the new defense should include within that term all formal guidance issued to the public by the FRB, such as sample forms and opinion letters, rather than being limited to Federal Reserve Board "interpretations", using that word as a term of art. See 12 C.F.R. §226.101, *et. seq.* The applicable history appears in the Senate Report which accompanied the enacted amendment's predecessor, S. 2101, 93rd Cong. 1st Sess.:

> The Truth in Lending Act is highly technical and the Committee does not believe a creditor should be forced to choose between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act. Accordingly, the Committee recommends an amendment to Truth in Lending requested by the Board which would relieve a creditor of any civil liability under Truth in Lending for any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board. In order to confer immunity from civil liability, the rule, regulation, or interpretation thereof must be *approved* by the Board itself and not merely by the staff of the Board. This amendment is contained under section 206 of Title II.
>
> S. Rep't. No. 278, Star Print, 93rd Cong. 1st Sess. (1973) p. 13. (Emphasis added)

Admittedly that report could be interpreted as not providing creditors protection if they relied upon advice, such as opinion letters and sample forms, published by the staff of the FRB. However, such a narrow reading would unduly limit the effectiveness of the defense. There are only

approximately fifty "interpretations" which have been formally promulgated by the Board of Governors, 12 C.F.R. § 226.101-226.1002, while there are over eight hundred and fifty FRB opinion letters. [April 1969-April 1974 Transfer Binder Special Releases—Correspondence] CCH Consumer Credit Guide and CCH Consumer Credit Guide ¶¶31,008-31,174. Further, the FRB has ruled that its staff's action in issuing such opinion letters may be construed as the opinion of the Board of Governors until overruled, Letter No. 444, March 1, 1971, [April 1969-April 1974 Transfer Binder Truth-in-Lending Special Releases—Correspondence] CCH Consumer Credit Guide ¶30,640. Perhaps most importantly, the FRB clearly believed that the language of a predecessor bill, identical to this one in regard to the "good faith compliance" defense, extended to opinion letters.

> [The FRB] feels that under the act as it would read after being amended by this bill, they could have adequate authority to deal with ambiguities and conflicts by using clarifying regulations, rules and *letters*.
>
> 119 Cong. Rec. S14415 (daily ed. July 23, 1973) (Emphasis added).

In light of this heavy reliance by the Board of Governors on its staff in issuing guidance to creditors, the better construction of the word "interpretation" in § 130(f) should include within that term formal staff action, such as the FRB letters and the Handbook, while, as set forth in the Senate report, denying protection where the creditor relies merely upon informal advice from a staff member. Under this interpretation, the factual question of whether defendant relied upon the Handbook, as alleged in the Kelly affidavit, App. pp. 106a-109a, is material to a resolution of the § 130(f) issue, even if the "unintentional violation" defense contained in § 130(c) (C.G.S. § 36-407(c), 15 U.S.C. § 1640(c)) applies only to clerical errors.

Even if the Court refuses to include staff action within the scope of the new defense and limits the defense only to interpretations "approved by the whole Board", S. Rep't No. 278, Star Print, 93rd Cong. 1st Sess. (1973) p. 13, it must still remand for a hearing to determine whether the Handbook was reviewed and approved by the whole Board of Governors rather than just by the staff. Prior to the new amendment, the exact method by which the Handbook was produced was irrelevant and no evidence regarding that genesis was introduced. However, the Handbook, portions of which were submitted as Exhibit 3 to the Kelly affidavit, App. p. 110a, states that it was "prepared *by The Board of Governors* of The Federal Reserve Board". (Emphasis added) See Exh. 1 to App't's Reply Br. If evidence showed that the Handbook was in fact approved by the whole Board, defendant would have a defense for the two violations discussed in this section.[4]

In summary, before this Court can affirm the District Court's judgment declaring defendant liable for failing to use the term "Unpaid Balance" or to describe the finance charge, the case must be remanded to the District Court for a hearing as to defendant's good faith compliance with the forms supplied by the FRB in its Handbook "What You Ought to Know About Truth-in-Lending" and its resultant protection by the new "good faith compliance" defense.

2. *The "unintentional violation" defense extends to errors of law.*

On the basis of authorities set forth in its prior brief, defendant contends that the proper interpretation of the

4. The final possible construction of the word "interpretation"—including therein only the fifty odd Board actions so denominated—would so narrow the section as to make it of no benefit, except to creditors so large that they would be sufficiently influential as to obtain consideration of their problem by the whole Board.

"unintentional violation" defense[5] protects creditors from errors of law, as well as mere clerical errors. Plaintiffs, adopting the rationale of *Ratner* v. *Chemical Bank New York Trust Co.*, 329 F. Supp. 270 (S.D.N.Y. 1971), argue for a more limited interpretation. Since defendant filed its prior brief, a Federal Reserve Board opinion has appeared adopting defendant's position that a creditor comes within the defense if, because of good faith reliance on an FRB form disclosure statement, he fails to conform to the Act. Letter No. 829, August 22, 1974, CCH Consumer Credit Guide ¶31,151. There, the chief of the Truth-in-Lending Section of the FRB states that the defense may not be invoked by a creditor who blindly adopts the forms provided by the FRB in its Handbook, "What You Ought to Know About Truth-in-Lending", where the facts of that creditor's transaction differ significantly from the hypothetical facts upon which the draft form was prepared. Implicit and unquestioned in that letter is the underlying principle that the "unintentional violation" defense would have been available to that creditor had he relied upon a form appropriate to his transaction.

> This is in response to your letter of July 25, inquiring whether a creditor who discloses a security interest in all after-acquired property may rely on the description of a security interest in Exhibit E of Federal Reserve Board publication, "What You Ought to Know About Truth in Lending", *to provide a good defense under §130(c) of the Truth in Lending Act as a bona fide error,* when the appropriate State law only allows a creditor to acquire a security interest in consumer goods (other than accessions)

5. "A creditor may not be held liable in any action brought under this section for a violation of this chapter and said sections if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." C.G.S. §36-407(c) (15 U.S.C. §1640(c))

> when given as additional security if the debtor acquires rights in them within 10 days after the secured party gives value (UCC §9-204).
>
> The sample forms found in this Board publication are intended *solely for the purposes of demonstration for the type of credit extended in that particular example.* When drawing up his disclosure forms, each creditor must insure that all information disclosed is accurate according to the law of the jurisdiction in which the disclosure form is to be used.
>
> CCH Consumer Credit Guide at 66,514 (Emphasis Added).

Such opinions of the FRB must be given great weight in interpreting these technical portions of the Act. *N.C. Freed Company* v. *Board of Governors of the Federal Reserve System,* 473 F.2d 1210 (2d Cir.), *cert denied,* 414 U.S. 827 (1973); *Gardner and North Roofing and Siding Corp.* v. *Board of Governors of the Federal Reserve System,* 464 F.2d 838 (D.C. Cir. 1972); *cf. Perine* v. *William Norton & Company,* —— F.2d —— (2nd Cir. Dec. 20, 1974) (Dkt. No. 74-1573). In light of this FRB guidance and the sound reasoning of the authorities cited by defendant in its prior brief, App't's Br. pp. 21-22, the Court should rule that the "unintentional violation" defense applies to errors of law and remand for a further hearing upon defendant's bona fides in attempting to conform to the Act's requirements.

3. *The "unintentional violation" defense is applicable to the declaratory judgment entered by the District Court.*

Defendant concedes that the "unintentional violation" defense does not apply to that portion of the District Court's Order enjoining defendant from "entering hereafter into any coupon contracts in Connecticut without first providing required truth-in-lending disclosures". Order ¶7, App. p. 183a. However, defendant disputes plaintiffs' contention that "such a defense in an action for declaratory . . . relief is baseless." App'ees' Br. p. 13.

In their substituted complaint, plaintiffs asked the District Court to "[e]nter a final judgment pursuant to Title 28 U.S.C. §2201 declaring: (a) that the Defendant has violated the Federal and State Truth-in-Lending Acts. . . ." Sub. Complt., Prayer for Relief, ¶3(a), App. p. 149a. Pursuant to that claim, the District Court ordered that "Defendant be and hereby is declared liable for violations of 15 U.S.C. §1640 in the following respects. . . ." Order ¶6, App. p. 182a. That order finally determines for purposes of this litigation defendant's liability for violation of the Act, leaving only the issue of what damages should be awarded for that violation. In light of that order, it is inconceivable that plaintiffs would concede that defendant is entitled to a full rehearing in the District Court on the question of liability prior to the Court's imposition of damages, and, in fact, they have already moved for the certification of a class for the damage portion of their action. Yet, such a rehearing would be necessary if the "unintentional violation" defense were inapplicable to declaratory relief; otherwise, defendant would never have an opportunity to litigate that defense.

Welmaker v. *W. T. Grant Co.*, 365 F. Supp. 531 (N.D. Ga. 1972), relied upon by plaintiffs, not only fails to support their position, but actually supports defendant. In that case, the Court disallowed the "unintentional violation" defense only as to injunctive relief, allowing it where Grant's liability for damages was at issue. Significantly, there was no independent request for declaratory judgment. Here, because of the declaratory judgment entered below, the District Court has already determined Grant's liability with the only remaining question being what consequences, including damages, flow from such liability. Therefore, as to this declaratory judgment, the defense is applicable.

The Federal Trade Commission's staff opinion, [April 1969-April 1974 Transfer Binder, Truth-in-Lending Special Releases—Correspondence] CCH Consumer Credit Guide ¶30,705, and the FRB opinion letter, Letter No. 842,

September 19, 1974, CCH Consumer Credit Guide ¶31,164, relied upon by plaintiffs, App'ees' Br. pp. 14-15, are not responsive to defendant's argument that reliance upon the FRB Handbook constitutes a defense under §407(c). The FTC letter merely expresses the opinion of one agency regarding the propriety of the Handbook disclosures. However, the FRB, as the agency given primary authority to interpret the Act, 15 U.S.C. §1604,[6] has opined to the contrary as recently as September 1974, stating that the "disclosure statement illustrated on page 22 of the pamphlet, 'What You Ought to Know About Truth in Lending', indicates that [disclosure of both 'amount financed' and 'unpaid balance'] may not be required. . . ." Letter No. 842, September 19, 1974, CCH Consumer Credit Guide ¶31,164 at 66,521. In light of this disagreement, to the extent that reliance on the Handbook provides a defense as a matter of law, the existence of a contrary opinion by an agency other than the FRB as to the propriety of the Handbook merely creates a question of fact as to defendant's "good faith" in relying upon the FRB advice. Such questions of fact must be resolved after a trial, not upon a motion for summary judgment. *Marrone* v. *U.S. Immigration and Naturalization Service*, 500 F.2d 413 (2nd Cir. 1974); *Schum* v. *South Buffalo Railway Co.*, 496 F.2d 328 (2nd Cir. 1974); *Lemelson* v. *Ideal Toy Corp.*, 408 F.2d 860 (2nd Cir. 1969).

The FRB letter cited by plaintiffs is equally irrelevant, since it was not issued until three years after the forms involved in this case were placed into circulation in 1971, Exh. 8 and 15. Stip. to Sub. of Doc., App. p. 155a. Clearly, any new learning conveyed by that letter could not have aided defendant in drafting its forms. Furthermore, as demonstrated by the language quoted at p. 14, *supra*, that letter does not disavow the Handbook form, but merely

6. The FTC's authority is limited to the administrative enforcement of the Act in certain limited segments of the economy, 15 U.S.C. §1607(c).

recommends that creditors take a conservative tack and include both terms "in view of recent court decisions and other Federal Agency opinions," CCH Consumer Credit Guide at 66,521.

B. A genuine issue exists regarding the adequacy of defendant's disclosure of insurance premiums.

Plaintiffs, in response to defendant's argument regarding the disclosure of insurance premiums, rely heavily upon an FTC staff letter and an FRB opinion letter, App'ees' Br. p. 16 n.9. Neither is relevant to the unusual facts of this case.

Although defendant's argument is set forth fully in its brief, App't's Br. pp. 33-36, a brief factual recapitulation is helpful in understanding the inapplicability of those letters. On review of a motion for summary judgment, all the facts set forth by defendant in the Kelly affidavit, App. p. 110a, and the Nash affidavit, App. p. 111a, must be taken as true. *Shinabarger* v. *United Aircraft Corp.*, 381 F.2d 808 (2nd Cir. 1967); *Entin* v. *City of Bristol*, 368 F.2d 695 (2nd Cir. 1966).[7] Under that standard of review, it must be accepted as true that insurance coverage provided under credit life and credit accident and health policies on the unpaid prior balance does not terminate at the time an add-on occurs, but remains in full force and effect for the new term of the contract, without additional charge to the debtor. Kelly Aff't. ¶29, App. p. 110a; Nash Aff't., App. p. 111a. Under those circumstances, the debtor need only make a decision regarding the expenditure of funds when he enters into the initial contract which creates the obligation that later becomes the unpaid prior balance. This

7. For this reason, *Welmaker* v. *W. T. Grant Co.*, 365 F. Supp. 531 (N.D.Ga.1972), relied upon by both the District Court and the plaintiffs, is inapposite to this case. In *Welmaker*, the Court held a full evidentiary hearing prior to rejecting defendant's contentions that insurance coverage continued without charge and that the insurance was not refinanced. Here, that factual issue is still in dispute.

"free-ride" on insurance for the extended term distinguishes this insurance situation from the normal case where the debtor must expend or become obligated to expend new sums when he refinances or adds onto an obligation. The August 26, 1969 FTC letter, [April 1969-April 1974 Transfer Binder Truth-in-Lending Special Releases—Correspondence] CCH Consumer Credit Guide ¶30,298, addresses itself to those latter disclosures. That letter merely states that disclosures which are required for a new contract are required for an add-on contract. However, as explained above, in the Grant add-on contract the debtor is in reality not purchasing any insurance on the prior unpaid balance and, therefore, there is no insurance premium to be disclosed.

The FRB letter of June 27, 1969, [April 1969-April 1974 Transfer Binder Truth-in-Lending Special Releases—Correspondence] CCH Consumer Credit Guide ¶30,068, is likewise irrelevant. That letter was issued in response to a request by a creditor who, every month, was charging its debtors a new premium for insurance. The creditor requested advice as to whether disclosure of the premium could be made twice annually, instead of when the premium expense was actually incurred each month. A copy of the letter requesting that opinion is attached hereto, Exh. 2 to App't's Reply Br.

The FRB letter of June 27, 1969, [April 1969-April 1974 fendant's coupon plan raised different issues than this case and is irrelevant to the insurance claim made by plaintiffs. In that proceeding, the sole issue regarding insurance was whether Grants, by its employees' course of conduct, lead customers entering into coupon contracts to believe that the customer's signature was required to appear both on the retail installment contract and the insurance contract. FTC Proposed Cor.pl. ¶14; App'ees' Br. Add. 3, pp. 7-8. This course of conduct, according to the FTC, made the purchase of insurance involuntary and, therefore, "Those

consumers' signatures on the 'Insurance Agreement' [did] not constitute the specific dated and separately signed affirmative written indication of the desire to obtain credit life and credit accident and health insurance coverage which is required by Section 226.4(a)(5)(ii) of Regulation Z if the cost of such insurance is not included in the finance charge." FTC Proposed Compl., ¶15, App'ees' Br., Add. 3, p. 8. Nowhere in that proceeding did the FTC consider the issue raised in this case—i.e., whether the continuation of credit insurance without cost to the consumer for an extended term constitutes a refinancing and, therefore, whether the premiums already disclosed at the beginning of the transaction must be disclosed again when the add-on contract is signed.

C. Each amount in the finance charge is properly identified.

Defendant contends that its finance charge on coupon contracts consists of only one item and, therefore, as a matter of law, the use of the term "finance charge" without any further itemization is an adequate disclosure.[8] App't's Br. pp. 30-33. In their brief, plaintiffs misconstrue the effect which defendant attributes to the FRB opinion letter of April 25, 1973, cited in support of this position. Letter No. 682 [April 1969-April 1974 Transfer Binder Truth-in-

8. Two other issues which are related to this claim are discussed elsewhere in this brief. First, plaintiffs argue that the insurance premium in add-on contracts must be included in the "finance charge" and that the finance charge therefore has two components, which must be separately itemized—a "time-price differential" component and an "insurance premium" component. As set forth at pp. 15-17, *supra*, this argument must fail on a motion for summary judgment, because a question of fact exists as to the underlying issue of whether the insurance premiums are part of the finance charge. Second, even if the Court holds that the single-item "finance charge" must be more fully described, defendant contends that it still was an error to hold it liable for a violation of the Act, as its conduct is excused under both the "unintentional violation" defense and the new "good faith compliance" defense, pp. 5-15, *supra*.

Lending Special Releases—Correspondence] CCH Consumer Credit Guide ¶30,972, App'ees' Br. pp. 20-21. Contrary to plaintiffs' claim, defendant contends neither that it relied upon the letter in drafting its form nor that the letter creates a new exemption to Regulation Z. Rather, defendant simply takes the position adopted by numerous courts, *Philbeck* v. *Timmers Chevrolet, Inc.*, 499 F.2d 971 (5th Cir. 1974); *Bone* v. *Hibernia Bank*, 493 F.2d 135 (9th Cir. 1974); *Taylor* v. *R. H. Macy & Co.*, 481 F.2d 178 (9th Cir.), *cert. denied*, 414 U.S. 1068 (1973); *Evans* v. *House-Hold Finance Corp.*, —— F. Supp. —— (S. D. Iowa 1973), [1969-1973 Transfer Binder] CCH Consumer Credit Guide ¶99,007, that the construction given by the FRB to its own Regulation should be granted great deference in determining the meaning of that Regulation.

Plaintiffs seek to impute Judge Frankel's criticism of one particular opinion letter by staff Attorney Garwood, *Ratner* v. *Chemical Bank New York Trust Company*, 329 F. Supp. 270 (S.D.N.Y. 1971), to the totally different letter at issue in this case. That argument is patently fatuous. As a leading FRB staff attorney, Garwood issued numerous letters, *see* [April 1969-April 1974 Transfer Binder Truth-in-Lending Special Releases—Correspondence] CCH Consumer Credit Guide; it is illogical to argue, as plaintiffs do, that possible errors in the reasoning of one of such letters extend *a priori* to all.

Plaintiffs' contention that the language of Conn. Reg. 36-395-7(c)(8)(A)(12 C.F.R. §226.8(c)(8)(i)) is "clear and unambiguous", App'ees' Br. p. 19, is incorrect. That section enumerates eight disclosures, including the "description" of the finance charge, which must be given "as applicable", Conn. Reg. 36-395-7(c)(12 C.F.R. §226.8(c)). The ambiguity inherent in the term "as applicable" is clear. *See United States* v. *Devonian Gas and Oil Company*, 424 F.2d 624 (2nd Cir. 1970).

D. A question of fact exists as to whether the "finance charge" is "meaningfully, clearly and conspicuously" disclosed.

Rather than demonstrating the validity of the decision below, plaintiffs' brief emphasizes the District Court's error in resolving a question of fact upon a motion for summary judgment. Plaintiffs set forth at length their interpretation of the analysis which a consumer would use in reading the retail installment contract, App'ees' Br. p. 22 n.12. They conclude that the "natural result", App'ees' Br. p. 22 n.12, of that reading would be to view the "net finance charge" as the finance charge. This conclusion is directly contrary to the equally "natural" reading set forth by defendant in its brief. App't's Br. pp. 28-29. It is precisely the question of which analysis is more likely and, consequently, whether the finance charge disclosure is "clear and meaningful" which must be resolved at trial. *Peritz* v. *Liberty Loan Corporation,* ——— F. Supp. ——— (N.D. Ill. 1973), [1969-1973 Transfer Binder] CCH Consumer Credit Guide ¶98,969, *appeal docketed* No. 74-1667, 7th Cir. August 20, 1974; *cf., Empire Electronics Co.* v. *United States,* 311 F.2d 175 (2nd Cir. 1962). Plaintiffs' reliance upon the Stipulation to the Submission of Documents, App. p. 152a, is misplaced, as that stipulation states only that the contracts *"may be submitted* for purposes of plaintiffs' motion for summary judgment." (Emphasis added). There is no stipulation as to the meaning or clarity of the documents and defendant has not waived its right to litigate which of the available contrary inferences is correct. *American Mutual Insurance Co.* v. *American Broadcasting-Paramount Theatres, Inc.,* 388 F.2d 272 (2nd Cir. 1972); *Empire Electronics Co.* v. *United States,* 311 F.2d 175 (2nd Cir. 1962).

E. A question of fact exists as to whether a security interest was retained.

Plaintiffs do not dispute defendant's position that a security interest must actually be retained before the disclosure requirement of Regulation Z becomes relevant. Rather, they claim that there is no factual question as to whether a security interest was so retained. This position is erroneous, as Magistrate Latimer's own opinion discusses the existence of that very question of fact. In Count III of their Substituted Complaint, plaintiffs allege a violation of the Retail Installment Sales Act, claiming that the defendant's contract fails to describe the security interest held—the same claim they make under the Truth-in-Lending Act. App. p. 134a. Defendant moved to dismiss that Count, but Magistrate Latimer denied the motion, stating: "Construing this aspect of the renewed motion to dismiss as a request for summary judgment by defendant, cf. Rule 12(b), Fed. R. Civ. P., the existing discrepancy between the coupon contracts' express indication of a reserved security interest and defendant's sworn disclaimer alone bars determination of the issues presented in [Count III] as a matter of law in defendant's favor. . . ." App. p. 177a. The language of the Truth-in-Lending Act and the Retail Installment Sales Act regarding the disclosure of security interests is identical in all relevant respects and, thus, the same question of fact bars summary judgment for plaintiffs on the security interest portion of their Truth-in-Lending claim.[9]

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9. The Truth-in-Lending Act provides:

"In connection with any consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable.

* * * * *

A description of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates." C.G.S. §36-405(a)(10).

The Retail Installment Sales Act provides:

The Tax Court proceeding relied upon by plaintiffs is inapposite to the issues here and does not invoke the doctrine of collateral estoppel. That case involved forms used for the sale of coupon books in defendant's tax years of 1963 and 1964, while the contracts at issue in this case were not even drafted until 1971. App. p. 155a, Exhibits 8 and 15; Kelly Aff't ¶¶22-24, App. pp. 107a-109a. Thus, even if defendant retained a security interest under the contracts at issue in the Tax Court case, it is not established with the certainty necessary for the entry of summary judgment that an interest was still retained eight years later, after the intervening passage of the Truth-in-Lending Act. Furthermore, the stipulation of facts upon which the Tax Court case was litigated states that the stipulation is only "for the purposes of this proceeding. . . ." That stipulation is attached as an Exhibit hereto. Exh. 3 to App't's Reply Br.

Plaintiffs cite *Lakitsch* v. *Brand*, 99 Conn. 388, 121 A. 865 (1923); *Trumbull Electric Manufacturing Co.* v. *John Cooke Co.*, 130 Conn. 12, 31 A.2d 393 (1943); *Beach* v. *Beach*, 141 Conn. 583, 107 A.2d 629 (1954), and *Connecticut Co.* v. *Division 425, Amalgamated Association of Street Employees*, 147 Conn. 608, 164 A.2d 413 (1960), for the principle that the contract, by mentioning a security interest, conclusively establishes that defendant retains such an interest. Those cases are inapplicable to the interpretation of the words at issue in this case. *Trumbull Electric Manufacturing Co.*, *Beach* and *Connecticut Co.* were all cases in which the language of the disputed contract taken in the context of the entire document was sufficiently clear and unambigu-

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"The retail installment contract shall disclose on its face, conspicuously, in meaningful sequence and in the terminology prescribed, each of the following items which is applicable.

* * * * *

A description of any security interest held or to be retained or acquired by the retail seller in connection with the extension of credit, and a clear identification of the goods to which the security interest relates." C.G.S. §42-84(b)(13).

ous to permit resolution of the question raised by the parties, *Connecticut Co.* v. *Division 425, Amalgamated Association of Street Employees,* 147 Conn. at 619, 164 A.2d at 418; *Beach* v. *Beach,* 141 Conn. at 592-93, 107 A.2d at 633; *Trumbull Electric Manufacturing Co.* v. *John Cooke Co.,* 130 Conn. at 16; 31 A.2d at 395[10], and the Supreme Court therefore held that no parol evidence could be introduced. However, where the language of the contract is so unclear that the meaning given a term by the parties cannot be determined without going outside the document's four corners, under Connecticut law parol evidence may be introduced.

> It is, of course, fundamental, as a matter of substantive law, that the terms of a written contract which is intended by the parties to set forth their entire agreement may not be varied by parol evidence. *Trumbull Electric Mfg. Co.* v. *John Cooke Co.,* 130 Conn. 12, 16, 31 A.2d 393; *Nagel* v. *Modern Investment Corporation,* 132 Conn. 698, 700, 46 A.2d 605. It is equally fundamental, however, that when the words used in a written contract are uncertain or ambiguous, parol evidence of conversations between the parties or other circumstances antedating the contract may be used as an aid in the interpretation of the contract, that is, in the determination of what was the intent of the parties which was expressed by the written words.
>
> *Maier* v. *Arsenault,* 140 Conn. 364, 367-68, 100 A.2d 403, 404-05 (1953).

Accord, Maltby, Inc. v. *Associated Realty Co.,* 114 Conn. 283, 158 A. 548 (1932); *Gray* v. *Greenblatt,* 113 Conn. 535, 155 A. 707 (1931); *Mazzotta* v. *Bornstein,* 104 Conn. 430, 133 A. 677 (1926). In this case, the term "merchandise"

10. *Lakitsch* v. *Brand,* 99 Conn. 388, 121 A.865 (1923) involved the right of one party to introduce evidence of an implied agreement which contradicted specific language of the contract. In this case, the question is the meaning of contract language, not the existence of any supplementary agreements.

in the security agreement portion of the contracts is ambiguous and cannot be determined from contract itself. Elsewhere on the face of the contracts, Exh. to Stip. to Sub. of Doc., 8 and 15, App. p. 155a, a distinction is drawn between "merchandise" and "merchandise coupon books". Directly above the portion of the contract which enumerates the consumer's purchases, is written: "[The buyer] hereby buys from the seller and the seller sells *the merchandise and/or merchandise coupon books* listed below upon the following terms and conditions". (Emphasis added). Elsewhere, one of the terms of the contract states: "The buyer agrees . . . (A) to assume responsibility for the loss, damage or destruction of the *merchandise*" (Emphasis added). Since, as stated in the Kelly affidavit, Kelly Aff't. ¶ 14, App. p. 104a, defendant replaces coupons which are lost, stolen or destroyed, obviously the term "merchandise" in this "assumption of risk" clause does not include coupon books. It would, thus, be a consistent interpretation of the contract to give the same meaning to "merchandise" in the security agreement clause.

In summary, the parol evidence rule would not exclude the evidence set forth in the Kelly affidavit regarding the lack of any security interest in coupon book transactions. Therefore, resolution of that question of fact on the motion for summary judgment was erroneous.

III.

The Defendant Is Not Engaged In The Small Loan Business Nor Are Its Contracts Usurious.

Plaintiffs in their brief, App'ees' Br. p. 26, like the Court below App. 175a, fail to distinguish between Connecticut's usury statute, § 37-4 and Connecticut's small loan act, §36-225 *et seq.* In its brief, App't's Br. pp. 44-46, defendant points out that there is no evidence in the record

to support a conclusion that it is engaged in the small loan business. It is significant that in their brief plaintiffs do not point to any part of the record to demonstrate that defendant is engaged in the small loan business or even claim that the defendant is engaged in the small loan business. §36-243 applies to only those engaged in the small loan business.

> "Chapter 647 of Title 36 of the General Statutes, Revision of 1958, regulates the lending of amounts of $1,000 or less. Basically, Chapter 647 is a licensing act providing that unless licensed pursuant to its provisions, no person (other than a state bank and trust company, national banking association, savings bank, industrial bank, private banker, credit union, building and savings loan association or licensed pawnbroker) may engage in the small loan business." Kafes, *Usury and Its Progeny: A Survey of Interest Rate Regulation in Connecticut,* 43 Conn. B.J. 220, 226 (1969).

It is also significant that in their brief plaintiffs do not cite a single Connecticut case holding that §37-4 applies to a transaction other than a "loan of money". Indeed, in their brief, App'ees' Br. pp. 26-29, they virtually concede that the coupons are not money, claiming merely that they can be used like money. Recognizing that §37-4, by its terms, applies only to "money", plaintiffs argue that the express term "money" should be extended to include "coupons."

The Court below was also of the view that §37-4 should not be given "narrow interpretation", App. 175a. However, under the law of Connecticut §37-4 must be narrowly construed. Rate statutes such as §37-4 (and §36-243) are in derogation of the common law. At common law usury meant nothing more than the charging of interest for the use of money. Any interest was usury without regard to the per cent charged. 6A Corbin, Contracts, §1498 (1962), *Cf.* 2 BLACKSTONE'S COMMENTARIES, 463 (Sharswood's ed. 1870)

"[T]here is no common law of usury". Kafes, 43 Conn. B.J. at 223. Connecticut usury law is contained in Chapter 663 of Title 37 of the General Statutes. Section 37-8 provides that no action may be brought to recover principal or interest on a usurious loan. In addition to the loss of his entire investment, a person who violates §37-4 is also subject to a criminal penalty under §37-7 of a fine of up to $1,000 or imprisonment for six months or both. Under the law of Connecticut the principle of strict construction applies to a statute which is in derogation of the common law or is penal in nature. *Mack* v. *Sears,* 150 Conn. 290, 294-295, 188 A.2d 863 (1963), and case cited.

Conclusion

For the reasons stated in Section I the decision below holding that jurisdiction exists under 15 U.S.C. §1640(e) should be reversed and the case remanded for a determination as to whether there is any other basis for federal jurisdiction, with instructions to dismiss the Complaint if no such basis is found; in the alternative for the reasons stated in Sections II and III, the judgment of the District Court should be reversed and further proceedings ordered.

Respectfully submitted,

By William J. Egan
J. Michael Eisner
David A. Reif
Attorneys for Defendant-Appellant

Wiggin & Dana
205 Church Street
P.O. Box 1832
New Haven, Connecticut

January 17, 1975

What you ought to know about

FEDERAL RESERVE
REGULATION

Truth In Lending

Consumer Credit Cost Disclosure

THIS NEW FEDERAL LEGISLATION GOES INTO EFFECT JULY 1, 1969

About This Pamphlet

If you extend consumer credit, then you must become familiar with Regulation Z on Truth in Lending. You will be responsible, as a creditor, for complying with the Regulation.

This pamphlet tells you how Regulation Z affects your business. It tells you what you must let your customers know when you offer or extend them consumer credit—including agricultural credit and real estate credit.

Here is what you'll find on the following pages:

- List of Federal Agencies that will enforce Regulation Z—as well as give you more information.
- Questions and Answers—answers to some of the questions you may ask. There are six sections: (1) general questions (2) finance charges and annual percentage rate (3) open end credit (4) loans and other types of credit (5) real estate credit and rescission (6) the advertising of credit. At the end of each answer you will find a reference to the section of Regulation Z that applies.
- Model forms to guide you.
- Example of a table.
- Regulation Z and the Law reprinted in its entirety—in center section.

Please note that the outside pamphlet material has been stated as simply and clearly as possible. **However, for exact information on what you must do to comply with the law, you must read thoroughly the applicable sections of Regulation Z.**

This new Regulation comes into effect on July 1, 1969, and covers exactly what you must disclose in writing to your customers and clients when you extend, arrange or just offer them credit.

Its Purpose

The purpose of Regulation Z is to let borrowers and customers know the cost of your credit so that they can compare your costs with those of other credit sources and avoid the uninformed use of credit. Regulation Z does not fix maximum, minimum, or any charges for credit.

Two Important Points to Bear in Mind

The *finance charge* and the *annual percentage rate* are really the two most important disclosures required by this regulation. They tell your customer, at a glance, how much he is paying for his credit and its relative cost in percentage terms.

The Businesses Affected

Regulation Z applies to: banks, savings and loan associations, department stores, credit card issuers, credit unions, automobile dealers, consumer finance companies, residential mortgage brokers, and craftsmen—such as plumbers and electricians. It also applies to doctors, dentists and other professional people, and hospitals. In fact to any individual or organization that extends or arranges credit for which a finance charge is or may be payable or which is repayable in more than four installments.

Material in this pamphlet has been prepared by the Board of Governors of the Federal Reserve System.

W. W. Shober, Assistant to Director
Division of Supervision and Regulations
Federal Reserve Board
Washington, D.C.

Re: Trust in Lending Act.

Dear Sir:

Recently Don Drews, Manager of the Group and Credit Life Department of Investors Life Insurance Company of Nebraska, Omaha, Nebraska, which company is a subsidiary of this company was in Washington, attending a meeting of managers of the Automotive Trade Associations in connection with their study of the "Truth in Lending Act" and Regulation Z promulgated by the Federal Reserve Board. Mr. Drews met you, and I believe briefly discussed the problem hereinafter mentioned.

Mr. Drews was advised that if the subject were submitted to you in writing that you would issue an interpretation thereon.

Investors Life of Nebraska writes credit life insurance on a group basis in numerous banks in Nebraska. A group credit life policy is issued to the bank and then if a borrower at the bank indicates a desire to have credit life insurance in connection with his loans at the bank, he signs an application for credit life insurance and we attach a copy of the application form that is used.

On the 15th day of each month the bank determines the amount of indebtedness then due from each debtor that is enrolled under the group credit life insurance program and the checking account of the insured in the bank is charged with the premium and we enclose herewith copy of the certificate of insurance and charge slip that is used by the bank for the individual accounts. The certificate of insurance and charge slip is then put with the checks of the insured and the certificate appears in his bank statement at the end of the month.

Usually the type of borrower that is covered under this group

Reed 6/27/69

creditor life insurance prog[illegible] the type of borrower that can get a straight loan and [illegible]s interest on a declining balance basis and not on a c[illegible]nt or add on basis. Usually such a borrower has an open line of credit and his first note will be on a six months basis. If he should borrow three times more in the same six month period then his notes will all be given the same maturity date as the original note and will run for only the unelapsed portion of the period of the first note.

It seems to Mr. Drews and the [illegible]er that if in connection with the first note, there is shown on the note the fact that credit life insurance is not required to secure the granting of the credit; that if desired the cost of the credit life is .75¢ per month per thousand and the customer is provided with a place to indicate his desire to have the credit life, if that is the fact, that then it should not be necessary to go through all this with each subsequent note and it should be sufficient to show this information only when the entire indebtedness is consolidated in the new note in those instances where such consolidation takes place. If the information as to the credit insurance has to be shown for the odd periods, this will make considerably more work for the banks. It seems to us that the spirit and purpose of the "Truth in Lending Act" will be carried out, if in connection with group creditor insurance, the data required to avoid having to include the cost of insurance in the computation of the percentage rate is shown once every six months and not in connection with each additional note in the six month period.

We will most sincerely appreciate your advice in connection with this state of facts.

Very truly yours,

CERTIFICATE OF INSURANCE AND CHARGE SLIP

Your indebtedness $____

Monthly Charge

Effective date of coverage.....

By your authorization we charge your account in the amount shown for loan cancellation protection of your indebtedness not to exceed the amount authorized by your enrollment card or $15,000. The term of the insurance for which this monthly charge is made is for a period of one month following the date the attached charge was made to your account.

Odd cents and amounts of indebtedness in excess of $15,000 not shown.

Investors Life Insurance Company of Nebraska
Omaha, Nebraska 68102

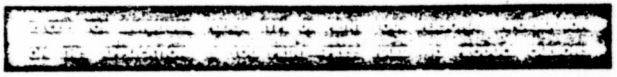
10,000's	1000's	100's	10's	1's	Total
1 7.50	1 .75 2 1.50 3 2.25 4 3.00 5 3.75 6 4.50 7 5.25 8 6.00 9 6.75	1 .08 2 .15 3 .23 4 .30 5 .38 6 .45 7 .53 8 .60 9 .68	1 .01 2 .02 3 .02 4 .03 5 .04 6 .05 7 .05 8 .06 9 .07	7 .01 8 .01 9 .01	

The terms and conditions stated on the back of this certificate and those found in the master's policy issued to the creditor are a part of this contract.

CL075N- Rev. 11-67 Name of Insured_____ Over

Account No._____

CREDIT LIFE ENROLLMENT APPLICATION
INVESTORS LIFE INSURANCE COMPANY of NEBRASKA



APPLICATION IS HEREBY MADE TO INVESTORS LIFE INSURANCE COMPANY OF NEBRASKA

MAXIMUM COVERAGE $ _____

BY _____ CHARGE PER $100 OF INDEBTEDNESS _____

FOR GROUP CREDITORS LIFE INSURANCE ON THE LIFE OF THE PROPOSED INSURED

TO BE COMPLETED BY PROPOSED INSURED

NAME _____
LAST FIRST INITIAL

ADDRESS _____
STREET CITY STATE

DATE OF BIRTH _____ HEIGHT _____ WEIGHT _____
MO. DAY YEAR

1. DO YOU KNOW OF ANY IMPAIRMENT NOW EXISTING IN YOUR HEALTH OR PHYSICAL CONDITION? ☐ YES ☐ NO
2. HAVE YOU CONSULTED A PHYSICIAN FOR ANY ILLNESS DURING THE LAST THREE YEARS? ☐ YES ☐ NO

IF THE ANSWER TO EITHER QUESTION IS YES, GIVE PARTICULARS INCLUDING NAME & ADDRESS OF PHYSICIAN AND DATES ATTENDED _____

INFORMATION IN THIS APPLICATION IS GIVEN TO OBTAIN INSURANCE AND, IS TRUE AND COMPLETE TO THE BEST OF MY KNOWLEDGE AND BELIEF. TO THE EXTENT PERMITTED BY STATUTE, I HEREBY AUTHORIZE ANY PHYSICIAN OR OTHER PERSON WHO HAS ATTENDED ME, OR WHO MAY HEREAFTER ATTEND OR EXAMINE ME, TO DISCLOSE ANY KNOWLEDGE OR INFORMATION THEREBY ACQUIRED BY HIM. A PHOTOSTAT OF THIS AUTHORIZATION SHALL BE AS VALID AS THE ORIGINAL.

DATE _____ SIGNATURE OF _____
PROPOSED INSURED

IT IS UNDERSTOOD THAT THE COMPANY SHALL INCUR NO LIABILITY BECAUSE OF THIS APPLICATION UNLESS AND UNTIL IT IS APPROVED BY THE COMPANY

I HEREBY AUTHORIZE MY BANK TO PROTECT MY UNPAID INDEBTEDNESS UNDER ITS CREDITOR GROUP LIFE PLAN WITH INVESTORS LIFE INSURANCE COMPANY OF NEBRASKA. I UNDERSTAND THAT THE TERMS AND CONDITIONS STATED ON THE MONTHLY CERTIFICATE AND THOSE FOUND IN THE MASTER POLICY ISSUED TO THE CREDITOR ARE A PART OF THIS CONTRACT.

DATE _____

AGENT _____ APPLICANT _____

FORM CL2009

UNITED STATES TAX COURT

W. T. GRANT COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 1813-68
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	[Filed June 15, 1970]
	)	
Respondent.	)	

STIPULATION OF FACTS

It is hereby stipulated that, for the purposes of this proceeding, the following statements shall be accepted as true, and all exhibits referred to and attached are incorporated in this stipulation and made a part of it; subject to the rights of the parties to introduce other and further evidence not inconsistent with this stipulation and preserving the parties' rights to object, at the time of trial, to any and all portions of said stipulation and attached exhibits as they may deem to be irrelevant or immaterial.

1. Petitioner is a corporation incorporated in 1937 under the laws of the State of Delaware, and has its principal office and place of business at 1441 Broadway, New York, New York. It is engaged in the business of selling a wide variety of merchandise at retail through more than one thousand stores located throughout the United States.

2. Petitioner duly filed its Federal income tax returns for its taxable years ended January 31, 1964 and January 31, 1965 (referred to as "1964" and "1965," respectively) with the District Director of Internal Revenue, 120 Church Street, New York, New York. Copies of relevant portions of such returns are included herewith as Exhibits 1-A and 2-B, respectively.

Coupon Book Installment Sales

3. Petitioner regularly sells personal property on the installment plan and accordingly is a "dealer in personal property," as such term is defined in Treasury Regulations §1.453-1(a)(1).

4. For many years petitioner has made sales of merchandise under three credit plans, in addition to cash sales. These credit plans are designated by petitioner as follows:

(i) "30-Day Option Plan," which is a revolving credit plan as defined in Treasury Regulations §1.453-2(d).

(ii) "Special Purchase Installment Plan," which is a traditional installment plan as defined in Treasury Regulations §1.453-2(b).

(iii) "Coupon Book Installment Plan," which petitioner contends is a traditional installment plan as defined in Treasury Regulations §1.453-2(b).

In the
United States District Court for the Second Circuit

Mildred Ives, Moira Robertson & Joyce Chapman, on behalf of themselves and others similarly situated,
Plaintiffs-Appellees,

vs.

W.T. Grant company,
Defendent-Appellant.

Affidavit of Service by Mail

STATE OF NEW YORK
COUNTY OF New York } ss.:

Robert McElroy , being duly sworn, deposes and says:

I am over the age of twenty-one years and reside at 32 Gramercy Park South , in the Borough of Manhatta n , City of New York. On the 20th day of January , 19 75 , at 6 o'clock P.M.

I served 3 copies of the Reply Brief of Defendant-Appellant

in the above-entitled action on:

Stuart Bear, Esq.
Zeldes Needle & Cooper
333 State Street
Bridgeport, Connecticut

Frank Cochran, Esq.
57 Pratt Street
Hartford, Connecticut

William H. Clendenen, Jr., Esq.
152 Temple Street
New Haven, Connecticut

~~the attorney for the~~

in the said action, by depositing said copies, securely wrapped, properly addressed, and postage fully prepaid, in a post office box regularly maintained by the U. S. Government in the post office at 90 Church Street, in the Borough of Manhattan, City of New York.

Robert Thackray

Sworn to before me this
20th day of January, 1975

Michael J. Hoops

MICHAEL J. HOOPS
Notary Public, State of New York
No. 30 4503056
Qualified In Nassau County
Commission Expires March 30, 1975